

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

NESTLÉ USA, INC.

and

Case 18-CA-231008

TOU VANG, an Individual

*Renée M. Medved, Esq.*, for the General Counsel.

*Timothy C. Kamin, Esq. and Jesse R. Dill, Esq.*  
*(Ogletree, Deakins, Nash, Smoak &*  
*Stewart, P.C.), of Milwaukee,*  
*Wisconsin, for the Respondent.*

DECISION

CHARLES J. MUHL, Administrative Law Judge. In February 2018, Tou Vang and several of his coworkers at a Nestlé USA frozen pizza production plant submitted a signed petition to human resources, in which they complained about verbal abuse by a line coordinator. During the Company's investigation of their complaints, Vang reported that he heard another employee say the line coordinator had called three black employees monkeys. However, the Company did not investigate that claim at the time. Although Nestlé suspended the line coordinator without pay in response to the petition, Vang and at least one other employee were dissatisfied with the Company's investigation and its response. Vang thought the line coordinator should have been fired. In April, Vang spoke to two African-American employees about his petition, the racist comment, and Nestlé's failure to investigate it. In early May, Vang reported the comment again but to a different supervisor, leading Nestlé to finally investigate the claim. The day after the report, Nestlé suspended Vang and, 11 days later, discharged him.

On March 22, 2019, the General Counsel, through the Regional Director for Region 18 of the National Labor Relations Board (the Board), issued a complaint against Nestlé USA, Inc. (the Respondent). The complaint principally alleges the Respondent's suspension and



discharge of Vang violate Section 8(a)(1) of the National Labor Relations Act (the Act), because the adverse actions were a direct response to Vang's protected concerted activity.<sup>1</sup> Nestlé USA denies the allegations. It claims that Vang was suspended because he interfered in the Respondent's May investigation of his complaints. The Respondent also asserts it lawfully discharged Vang due to dishonesty, including about the racist comment being made, and his refusal to cooperate in the company's May investigation of his complaints. From October 9 to 11, 2019, in Milwaukee, Wisconsin, I conducted a trial on the complaint. On November 15, 2019, the General Counsel and the Respondent filed posthearing briefs, which I have considered. I conclude that Nestlé USA's suspension and discharge of Vang were unlawful.<sup>2</sup>

#### FINDINGS OF FACT

The Respondent operates a facility in Little Chute, Wisconsin, where it produces and distributes pizzas and pizza products, including those under the DiGiorno's and Jack's brand names. Roughly 1000 employees work at the plant, which operates 24 hours a day. Tou Vang began working in a product support position for Nestlé on February 2, 2010. His job was to drive a forklift and supply assembly line 5 (AL5) with supplies for production. Approximately 30 to 35 employees, including Vang, work a shift on AL5 running from 5 p.m. to 5 a.m. In 2018, Jon Balakrishnan, a production supervisor, was Vang's direct superior. Balakrishnan reported to Justin Preisler, a business unit manager. The plant manager is Marcus Brenneman.

The Respondent also employs line coordinators, a nonsupervisory position, to walk the production lines and ensure they are running smoothly. In 2018, Vang's line coordinator was Jack Lee. Vang had worked with Lee for about 5 years, the last two with Lee in the line coordinator position. Chong Vue and See Yang were back-up line coordinators for Lee. Anthony Burke was Vang's team leader. Vang, Lee, and several other employees at the facility are Hmong.

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<sup>1</sup> The complaint was premised upon an unfair labor practice charge filed by Vang against the Respondent on November 14, 2018. The Respondent admitted in its answer to the complaint that the Board has jurisdiction in this case. In conducting its business operations during the calendar year ending December 31, 2018, the Respondent sold and shipped from its Little Chute, Wisconsin facility goods valued in excess of \$50,000 directly to points outside the State of Wisconsin. The Respondent also admits it is a Sec. 2(2), (6), and (7) employer within the meaning of the Act.

<sup>2</sup> In order to aid review, I have included citations to the record in my findings of fact. The citations are not necessarily exclusive or exhaustive. I largely have placed the citations in footnotes at the end of each paragraph. In assessing witnesses' credibility, I have considered their demeanors, the context of the testimony, the quality of their recollections, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd. sub nom.* 56 Fed.Appx. 516 (D.C. Cir. 2003). Where needed, I discuss specific credibility resolutions in my findings of fact.



# I. VANG’S PETITION WITH EMPLOYEES’ COMPLAINTS ABOUT JACK LEE

The Respondent maintains a policy prohibiting unlawful discrimination and harassment, including based upon race.<sup>3</sup> The policy defines harassment to include verbal conduct that creates an intimidating, offensive, or hostile work environment or that interferes with work performance. Racial slurs or epithets are among the examples of verbal harassment listed. The policy requires employees to report harassment to a supervisor, manager, or the human resources department. It also bans retaliation against employees who make harassment complaints or participate in a harassment investigation. The policy states the Respondent will conduct a prompt, thorough, and objective investigation into any good-faith report of harassment. It also states: “Confidentiality will be maintained throughout the investigatory process to the extent practical and appropriate without impeding the investigation.” Finally, the policy states that any employee who makes a false report of harassment is subject to disciplinary action, up to and including termination.

In early February 2018, Vang drafted and signed a petition with complaints about Lee for submission to the human resources department.<sup>4</sup> In its opening line, Vang asked for an investigation of Lee for “abuse of power and disrespecting fellow coworkers.” The petition went on to describe several examples of Lee’s alleged misconduct. Vang wrote that Lee called coworkers stupid, something Vang personally observed, and told older workers they were slow. He stated that Lee threatened employees with discipline if he found them standing around. He described an incident where Lee interceded when an employee was assisting a coworker and told the employee it was not her job to help and to go back to her station. Vang also wrote that Lee had bragged about working on a machine without shutting it down (called a “lock out/tag out”) and encouraged other operators to do the same thing.<sup>5</sup>

On February 6, Vang solicited his coworkers to sign the petition concerning Lee. When he presented the petition to them, Vang repeated its introductory line, telling them it was a petition to investigate Lee for abuse of power and his treatment of employees on the line. Seven of Vang’s coworkers signed the petition.<sup>6</sup>

The petition signers included employees Ashley Schmitt, who had worked for the Respondent for almost 10 years at the time, and Sydney Vang, who is Tou Vang’s brother. Schmitt is a net weight operator who weighs all the ingredients on the pizzas. Schmitt signed the petition because Lee criticized her all the time and she wanted to do something about it. She previously had spoken to supervisors about Lee’s conduct, but nothing was done. Schmitt also wrote a statement and gave it to Vang. In it, she identified herself as the employee Lee had yelled at to stop helping a coworker and described the incident. She also stated Lee yelled at her and called her a stupid idiot on more than one occasion.<sup>7</sup>

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<sup>3</sup> GC Exh. 20.

<sup>4</sup> All dates hereinafter are in 2018, unless otherwise noted.

<sup>5</sup> GC Exh. 2; Tr. 29–33.

<sup>6</sup> Tr. 33–35.

<sup>7</sup> Tr. 167–169; GC Exh. 11.



The petition signers also included Chong Thao, a case packer. A few months earlier, Vang was in the break room and heard Thao speaking in Hmong to other employees at a table. Vang heard Thao say that Lee referred to three African-American employees as monkeys, that he had put three monkeys on bins and they could not do it. Just before drafting the petition, Vang asked Thao about the comment and Thao confirmed he was in a group of employees who heard Lee say it. However, Vang did not include this information in the petition.<sup>8</sup>

Two coworkers to whom Vang spoke refused to sign the petition. One of them was Xe Xiong, a pepperoni operator employed by the Respondent for more than 20 years. Vang approached her about the petition, because he had seen Lee yelling at her when she dropped pepperonis or was not working fast enough for Lee. He wanted Xiong to not be scared about coming forward with how Lee treated her. He told her what Thao heard Lee say about African-American employees. He also described an incident involving his brother Sydney. Vang said Lee told Sydney to work as a cheese operator, even though he was not certified for that position. Lee threatened to report Sydney for sleeping on the job if Sydney refused the assignment. Vang told Xiong that Lee was blackmailing Sydney and that was not right. He asked Xiong to sign the petition and told her, if a lot of the employees did so, the Company would fire Lee and Vang would be their new boss. Xiong responded that Lee had not done anything bad to her, so she would not sign it. She also told Vang that he should forgive Lee for what he had done to other employees and, referring to the petition, “we don’t do this to Hmong people.” She added that, if Vang was willing to submit a petition accusing a coworker of being racist, he should do it for Donna Tarkowski, a different team leader.<sup>9</sup>

On the morning of February 8, Vang submitted the petition in an envelope addressed to Holly Rajchel, a human resources (HR) manager for the Respondent. That evening before he began his shift, Vang spoke to Neil Scullion, an HR representative, about his petition and whether Rajchel had received it. Scullion did not answer the question, instead telling Vang to go to work as usual and bring up any questions with his supervisor, Balakrishnan. Later during Vang’s shift, Scullion and Balakrishnan met with him. Scullion asked Vang why he did not

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<sup>8</sup> Tr. 44-47. The Respondent utilizes cartoners and case packing machines for packaging the pizzas. If those machines go down, a conveyor takes the pizzas to bins for holding. When the machine is restored to operation, employees take the pizzas out of the bins and put them back on the line. Typically, only two employees are assigned to this task.

<sup>9</sup> Both Vang and Xiong testified about their conversation. (Tr. 41-49, 111, 434-441.) Their accounts were not in conflict, except in two instances. First, I credit Xiong’s testimony that Vang told her they could get Lee fired if enough people signed the petition and Vang would become their boss. I found Xiong’s demeanor when providing this testimony to be authentic and credible. Vang admitted that, at a minimum, he told Xiong he would consider signing up for Lee’s job if Lee got fired. Second, I credit Vang’s testimony that Xiong alleged Tarkowski was racist in their conversation. Xiong’s demeanor when claiming she never spoke to Vang about Tarkowski appeared unreliable. Moreover, Xiong gave a blanket denial of ever speaking to anyone from the Respondent about how Tarkowski treated Hmong employees. However, as will be discussed later, Xiong was interviewed by the Respondent in May preceding Vang’s discharge, during which she stated that Tarkowski was tougher on Hmong employees.



bring the petition issues to his supervisor first. Vang responded that he felt Balakrishnan and Lee were too close and that was why he did not go to Balakrishnan first.<sup>10</sup>

## II. THE RESPONDENT'S INVESTIGATION INTO THE EMPLOYEES' COMPLAINTS

5 After receiving Vang's petition and Schmitt's statement, Rajchel assigned the matter to Stacy Sipiorski, an HR generalist, for investigation of the complaints. Sipiorski told Scullion to get statements from the employees who signed the petition. She also told him to get a statement from Lee, then suspend Lee pending the completion of the investigation. On February 9, Scullion obtained Lee's statement. In it, Lee denied ever putting his team members  
10 down, saying he solved problems and gave them tips on how to perform better. He said he treated everyone with respect and never called anyone stupid or not good at what they do in front of them. He conceded that he verbally stated he might have violated lock-out, tag-out due to rushing, but said he never told employees not to lock out and never put himself or his team members in danger. Lee also wrote that he told Schmitt not to help in the cheese room, because  
15 he previously caught her in there talking to Sydney Vang which interfered with production. Finally, Lee described an incident of having caught Sydney Vang sleeping on the job.<sup>11</sup>

From February 9 to 12, the Respondent obtained statements from the petition signers. Multiple people, including Thao, alleged that Lee yelled at employees and threatened them  
20 with discipline if they stood around. Thao submitted three statements detailing alleged misconduct by Lee directed towards Thao himself. However, Thao did not include that he heard Lee call three black employees monkeys.<sup>12</sup>

After a weekend off, Vang returned to work on February 12. Scullion again met with  
25 him, this time with Ben Schwartz, the production line 2 supervisor. Vang brought and submitted to Scullion a new statement regarding Lee. The statement included the following:

Was eating lunch one night, heard Chong Thao mention that Jack  
said he put three monkeys on bins and they can't even do it.

30 The statement contained three additional complaints about Lee. They included that Lee once had grabbed Thao by the collar and shook him; Lee yelled and screamed so much at another employee that she resigned; and Lee one time did not let anyone go on break until 3 a.m. or 10 hours into their shift. Vang discussed the statement's content with Schwartz, including the  
35 alleged racist comment. Scullion said Sipiorski wanted to know why Vang did the petition and Scullion wanted Vang to write the answer down. Vang wrote that he felt the petition about Lee was the right thing to do.<sup>13</sup>

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<sup>10</sup> Tr. 50-55. Vang submitted a similar petition signed by him and three other employees with complaints about See Yang. (GC Exh. 3.)

<sup>11</sup> Tr. 266-271; GC Exh. 22.

<sup>12</sup> GC Exhs. 4-6, 12, 23-29, 49. Tou Vang's statements are GC Exhs. 4-6. Thao's statements are GC Exhs. 24, 26, and 29.

<sup>13</sup> GC Exhs 4, 5; Tr. 55-59.



On February 16, Sipiorski met with Lee and gave him a verbal warning for being disrespectful to his coworkers, including by yelling and using language that was vulgar or could be perceived as intimidating. The Respondent also determined that Lee's suspension pending investigation, which amounted to somewhere between 1 and 2 weeks, would be unpaid. Because of the allegations against Lee which the Respondent found valid, Sipiorski decided to meet with all the petition signers to advise them of the investigation's results.<sup>14</sup>

### III. SIIORSKI'S FEBRUARY 21 MEETING WITH THE PETITION SIGNERS AND ITS AFTERMATH

On February 21, Sipiorski and Balakrishnan met with Vang and five other petition signers, including Schmitt. Sipiorski had all of the employees execute a sign-in sheet. She then told them that Lee would be coming back and they would coach him. She showed the employees the bottom of the sign-in sheet they signed, which stated: "By signing this sign-in sheet, I agree to wear a unicorn suit and bake cookies for my line." Sipiorski told them all kiddingly that they had agreed to do so. She added that they did not read everything on the petition they signed and it was not all correct. Sipiorski also asked the employees why they signed the petition, if they did not agree with everything on it. She told them they were jeopardizing Lee's employment. Vang responded that, even if all the signers did not agree to everything in it, the petition would not be invalid. He told her they came together to express their concerns about Lee. At the end of the meeting, Sipiorski told the employees to stop by her office if they had anything new. As the employees walked out, Balakrishnan asked why they looked so down. Both Vang and Schmitt were dissatisfied with how Sipiorski handled the meeting. Vang was not happy with Sipiorski's unicorn joke. Schmitt felt Sipiorski made Lee out to be the victim.<sup>15</sup>

The next day, Vang called Brenneman, the plant manager, to ask for a meeting. The two eventually met on March 1. Vang began the meeting by describing his work performance and ethic. He gave Brenneman a recommendation letter he received from a prior employer. Vang also told Brenneman he looked out for his fellow employees. He provided Brenneman with a copy of the Lee petition, which Brenneman read. Vang described some of both his and the other employees' complaints about Lee's conduct, including his mistreatment of coworkers and the racist comment Thao allegedly heard. He told Brenneman that Lee should be fired for the things he did to people on the factory floor. Vang also told Brenneman he was fearful Lee would retaliate against him and described how Lee refused to visit his own father in the

<sup>14</sup> Tr. 288-294; GC Exh. 31, R. Exh. 13.

<sup>15</sup> Tr. 64-68, 173-176, 294-298; GC Exh. 50. I credit Vang's testimony, which largely was uncontroverted, concerning what was said in this meeting. Sipiorski and Schmitt also testified about the meeting, but only about the sign-in sheet and the discussion regarding it. In addition, Sipiorski confirmed that she did not tell the employees that Lee was given an unpaid suspension due to his misconduct. (Tr. 381-382.) As to the sign-in sheet, Sipiorski testified that she and Rajchel decided to put the unicorn joke in after it was reported to Sipiorski that several employees did not know what was in the petition when they signed it. The record evidence does not establish that any employees actually reported that to Sipiorski.



hospital when his father was near death. Vang said he did not think Lee would forgive employees for the petition. Vang also said the employees were unhappy with and felt disrespected by human resources' handling of their complaints. He raised Sipiorski's unicorn and cookies joke on the sign-in sheet for the February 21 meeting. Brenneman immediately  
 5 apologized for it and told Vang it was not the company's intention to make employees feel their claims were not being taken seriously. At the end of the meeting, Brenneman told Vang he personally would look into the employees' complaints about Lee, including examining all the statements and other documents to ensure human resources made the correct decision regarding Lee's discipline. Brenneman then went to Rajchel and Sipiorski. The three reviewed  
 10 the case and Brenneman determined the original investigation and its results stood.<sup>16</sup>

On March 7, Sipiorski visited Vang on the plant floor. She told him that Brenneman sent her to check on the employees and see how Lee was doing. Vang responded that it was too soon to tell. Sipiorski said that they reviewed their investigation into the employees' complaints  
 15 about Lee and everything stands. She told him, if any new concerns about Lee arose, he should report them right away to his supervisor or team leader. Vang told her he was upset at the investigation's outcome, noting specifically that the Respondent did not do anything about the lock-out/tag-out violation. Sipiorski replied that no proof existed that Lee violated the procedure. Vang told Sipiorski that she did not care about the petitioners. Sipiorski responded  
 20 that she was offended. Vang asked how she could be when she made a big joke about unicorns and baking cookies. Sipiorski apologized and told him the joke was Rajchel's idea.<sup>17</sup>

#### IV. VANG SPEAKS TO BLACK EMPLOYEES ABOUT LEE'S ALLEGED RACIST COMMENT

At the beginning of April, Vang spoke to Victor Onyango, an African-American  
 25 coworker who worked on a different line. Vang explained why he made the petition against Lee, including that he had heard Thao in the break room tell other employees that Lee said he put three monkeys on bins and they could not do it. Vang then told Onyango the Respondent had not properly investigated whether Lee made the comment. Onyango responded that he  
 30 could not believe the Respondent would not investigate it.<sup>18</sup>

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<sup>16</sup> Tr. 69-74, 457-466, 471-472. Vang and Brenneman testified concerning their meeting, by and large without any contradictions and with each person remembering different statements in the conversation. I credit their testimony to the extent it is not contradictory. However, I do not credit Brenneman's testimony that he discussed Lee's alleged racist comment with Rajchel and Sipiorski in their meeting. (Tr. 463-464.) Sipiorski did not corroborate this testimony. (Tr. 299-301.) Moreover, Brenneman claimed the three discussed statements obtained from other employees about the racist comment and the fact Vang had not heard the comment directly. However, and as will be discussed later, the Respondent did not have those statements until May, because it did not investigate Lee's alleged racist comment until that month. Brenneman appears to have confused the timing of any discussion he had with Rajchel and Sipiorski about the issue.

<sup>17</sup> Tr. 74-77, 301-302.

<sup>18</sup> Tr. 77-79.



On April 9, Rajchel sent an email to one of the Respondent's human resources recruiters, in response to Vang claiming he was owed an additional \$500 for referring an employee to the Company. Rajchel wrote: "If [Vang] gives you any issues, please let me know. He can be (trying to be PC) complex."<sup>19</sup>

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About April 18, Vang spoke to a second African-American employee, Masomo Rugama. Vang explained why he did the petition against Lee, including telling Rugama that Lee said he had put three monkeys on bins and they could not even do it. Rugama responded that he thought Lee was referring to Rugama and two other employees who had worked together on bins one night in the recent past and had trouble while the line was running pizza margheritas. Rugama said they had many jam ups on the cartoner and case packer, meaning working the bins was hectic that night. Rugama also told Vang that, if he had known Lee called them monkeys, Rugama would have signed Vang's petition. Vang spoke to Onyango and Rugama about Lee's alleged racist comment because he felt the Respondent had not properly investigated it and the two employees were African-American.<sup>20</sup>

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## V. THE SUSPENSION OF TOU VANG

On May 9 at 5 p.m., Vang and his brother Sydney met with Balakrishnan and Justin Preisler, a business unit manager and Balakrishnan's superior. The Vang brothers went to speak to the supervisors because of an issue Sydney was having with Chong Vue, a back-up line coordinator to Lee. Vue recently had moved Sydney to a different line, which the Vang brothers believed was due to Vue's jealousy over the relationship between Sydney and Schmitt and seeing the two of them talk on the line. They felt their line performance had dropped since Sydney was moved. Vang also told the supervisors he felt taking Sydney off the line was retaliation for Vang's prior petition about Lee. Vang then explained his conversation with Xiong about the petition back in February. He described her comment that Hmong people do not do that to other Hmong people and, if Vang wanted to submit a complaint about someone being racist, he should do so for Tarkowski. Preisler responded that he would investigate that allegation. Vang then complained to Preisler about Lee's alleged racist comment and how human resources had not investigated that discrimination claim. Vang added that Thao heard

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<sup>19</sup> GC Exh. 56.

<sup>20</sup> Tr. 79-82, 521-524. I credit Vang's testimony concerning his conversation with Rugama, in particular that Rugama told Vang he believed Lee's alleged monkeys comment was referring to Rugama. I do not credit Rugama's testimony that Vang told him Lee had called Rugama a monkey in the break room. (Tr. 194, 202, 203.) Rugama did not include that claim in a statement he provided during the Respondent's May investigation into the monkeys comment. (GC Exh. 13.) Instead, he said: "I was told by Tou that Jack said in the break room one day that he put 3 monkeys on the blue bins but they can't make it." Thus, Rugama's statement corroborates Vang's, not Rugama's, testimony. Moreover, when Rugama testified concerning his conversations with Vang, he appeared uncertain in a manner that Vang did not when he testified about the same subject matter. Finally, I find Vang's testimony more plausible, because there is no evidence suggesting that Vang somehow knew that Rugama and Onyango had trouble one night on bins before informing them of Lee's alleged comment. (Tr. 523, lns. 15-16.)



the comment, Vang had spoken to Rugama about it, and Rugama believed it referred to him. Preisler stated he would speak to human resources about the issue.<sup>21</sup>

That same evening, Vang encountered Rugama while driving his forklift in a hallway. Vang told Rugama he had just spoken to Preisler and told him about the claim that Lee made the discriminatory monkeys comment. He said to Rugama that human resources might come to speak to him about it.<sup>22</sup>

At 3:15 a.m. on May 10, Lee emailed Balakrishnan and reported that Vang “confronted” Rugama in the cartoner room and told Rugama that Lee had called “three Swahili over by the bins” monkeys. He also described what Rugama told him Vang had said. The description matched the first conversation Vang had with Rugama back in April, not the conversation the two had earlier the same evening. Shortly thereafter, Preisler heard that Vang had spoken to Rugama after Preisler met with Vang on May 9.<sup>23</sup>

When Sipiorski arrived at work the morning of May 10, Preisler told her about his meeting with the Vang brothers and gave Sipiorski his notes of the meeting. After reading that Lee was accused of making a racist comment, Sipiorski decided Lee should be suspended pending investigation again. She told Preisler to get statements from witnesses, including Lee, and to suspend Lee. At 9:46 a.m. that morning, Sipiorski received a copy of Lee’s email to

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<sup>21</sup> Tr. 84–90, 476–480; GC Exhs. 43, 44. Vang and Preisler testified consistently about the discussion in this meeting, except that Preisler stated he told the Vang brothers at the end of the meeting “I just ask that you don’t go out there and rock the boat, just let us do our job, let us investigate.” (Tr. 480.) I do not credit that portion of Preisler’s testimony, which came across as unreliable and did not appear in Preisler’s contemporaneous notes of the meeting. The testimony also is inconsistent with Sipiorski’s investigation notes, which indicate Preisler said, “go do your job, don’t ruffle feathers.” (R. Exh. 44, p. 2.) Even if Preisler said, “don’t rock the boat” or “don’t ruffle feathers,” neither comment constituted a clear and definitive instruction to Vang to not discuss the meeting or the investigation with other employees.

<sup>22</sup> Tr. 90–91. I credit Vang’s testimony concerning this conversation. The testimony again is corroborated by Rugama’s May statement to the Respondent, in which he stated Vang told him that Preisler “might come to ask me about this issue tomorrow,” after describing that Lee was alleged to have said he put three monkeys on blue bins but they can’t make it. I do not credit Rugama’s initial testimony that Vang also said to Rugama he should feel free to tell human resources what Vang had told Rugama, that Lee had called Rugama a monkey. (Tr. 194, 197.) Rugama did not include this in the affidavit he provided to the General Counsel during the investigation into Vang’s unfair labor practice charge. (Tr. 201.) During repeated questioning about the omission, Rugama’s testimony was inconsistent and unclear. (Tr. 195–205.) He appeared unsure of himself and acknowledged his inability to remember everything regarding what occurred given the passage of time. (Tr. 200–201, 203.) Ultimately, Rugama changed his testimony and stated he could not remember if Vang had made the additional comment. (Tr. 212.)

<sup>23</sup> R. Exh. 17; Tr. 481–482. The record evidence does not establish how Lee learned of Rugama’s conversation with Vang. It appears an operator, John Janke, spoke to Rugama and then reported his discussion to Lee. (R. Exh. 30.) Preisler did not explain specifically how he learned of Vang’s May 9 conversation with Rugama.



Balakrishnan concerning Vang's conversation with Rugama the prior evening. Later that same day, Sipiorski received in her mailbox a document signed by Vue dated May 9. It contained Vue's log of different alleged acts of misconduct by Tou and Sydney Vang. It had entries for seven different dates, the first on February 21 and the last on May 8. The text for May 8 included the allegation that the two Vang brothers were still mad over the situation with Lee and were "looking at us to see the 1st thing we do wrong to report us."<sup>24</sup>

At 5:30 p.m. on May 10, Preisler and Scullion met with Rugama. Scullion asked him if anyone had talked to him the night before. Rugama responded yes, that Vang told him there was an ongoing investigation about Lee's monkeys comment and human resources or Preisler might come talk to him. Rugama described the conversation he had with Vang on April 18. He also told them about the day Lee got mad at him and two other employees who were working on bins. He said that Lee was angry, because there were a lot of jams for the product they were running that night. Scullion asked Rugama to write a statement. Rugama declined, telling them he could not because he considered the whole thing to be nothing, he did not hear Lee insulting him, and he was not sure Lee had done so.<sup>25</sup>

After meeting with Rugama, Preisler and Scullion called Sipiorski. The three talked and reached a consensus that Vang should be suspended pending investigation so that they could carry out an unimpeded investigation.<sup>26</sup>

At 6:55 p.m. on May 10, Vang met with Preisler and Scullion. Preisler asked him if he had gone into the cartoners room to talk to Rugama, after he had met with Preisler the prior day. Vang said he did not go into the cartoners room to speak to Rugama. He did so, because he had spoken to Rugama in the hallway, not the cartoners room. However, he did not share that information with Preisler. Scullion told Vang he was suspended for going there and talking to Rugama. Vang responded he had not gone in there. Preisler told Vang he was suspended for interfering in their investigation. Scullion then told Vang to write out a statement, which Vang did. In his statement, Vang described his first conversation with Rugama about Lee's alleged racist comment and said Rugama "didn't like that Jack said such things." He also stated: "Yesterday I did not go into the cartoner room to speak with [Rugama]." Vang left the plant and went to his car in the facility's parking lot. Scullion called him while he was sitting in there and said "we don't want you to talk to anybody."<sup>27</sup>

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<sup>24</sup> Tr. 305-310, 318-320; R. Exh. 19. Anthony Burke, another team leader, also submitted a statement dated May 9 describing how Susan Vang told Burke that the Vang brothers were not happy with how the whole situation with Lee had turned out and felt he should have been fired for his conduct. (R. Exh. 20.) Neither Sipiorski nor Preisler explained the origin of Vue's log or Burke's statement.

<sup>25</sup> Tr. 184-188, 483-485; GC Exhs. 13, 32.

<sup>26</sup> Tr. 485-486. I credit Preisler's testimony regarding when Vang was suspended. Sipiorski testified that they made the decision after she received the email Lee sent to Balakrishnan (Tr. 325-326), but Preisler's testimony and the contemporaneous notes taken of his meetings with the employees that day contradict Sipiorski's assertion.

<sup>27</sup> Tr. 91-96, 137-143, 488-491; GC Exhs. 7, 8. Vang's testimony concerning what Scullion told him on the phone (Tr. 95) is uncontroverted, as Scullion did not testify.



## VI. THE TERMINATION OF TOU VANG

*A. The Respondent Obtains Additional Statements From Employees*

5 That same evening after suspending Vang, Preisler, and Scullion met with Thao. They asked him to provide a written statement on what he may have heard Lee say to describe African-American employees. Thao wrote: "I was break at that time Mr. Jack Lee he say the monkey people." Preisler and Schwartz then met with Xiong. Preisler asked her if she had said  
 10 Tarkowski was racist. Xiong responded that she did not recall saying that, but did feel Tarkowski was harder on Hmong employees than non-Hmong employees. Xiong declined to give a written statement. She told Preisler he could speak with another employee, Mai Thao, about Tarkowski's behavior, because she actually was a part of Tarkowski's crew. In his notes of the meeting, Schwartz wrote that Xiong was "uncomfortable reporting anything specific."  
 15 Finally, Preisler and Scullion met with Lee. Scullion asked him if he ever referred to any employees as monkeys. Lee responded that he might say things like that outside of work, but he would never do it at work. Lee said he treated people professionally and respectfully. Lee provided a statement saying the same thing. At the end of the meeting, Preisler and Scullion decided to suspend Lee pending the completion of their investigation, given the severity of the  
 20 allegation against him.<sup>28</sup>

During the same overnight shift, Rugama changed his mind and provided a statement. In it, he named two other employees—Edison Bizimana and Adolphe Matabaro—who were working bins one night and encountered a lot of jams. He wrote that another employee told  
 25 him that night that Lee complained to the employee that Rugama was no longer hard-working. Rugama also wrote that Vang told him 2 to 3 months earlier that Lee said in the break room 1 day that he put three monkeys on bins and they could not make it. Rugama then stated:

30 Last night, around 10pm from my break I met with [Vang] while he was driving and he told me that Justin [Preisler] might come to ask me about this issue tomorrow.

Rugama concluded his statement by saying he did not "care what they said that I am monkey, what I know is that I am human."<sup>29</sup>

35 From May 11 to 15, the Respondent obtained numerous, additional statements from employees as part of the investigation. On May 11, Sipiorski received a second statement from Vue, where he reiterated the claim that the Vang brothers were unhappy about Lee and wanted the line leadership to change. Vue also reported that Rugama spoke to him on May 9 and said  
 40 that Vang told Rugama Lee had called him names and looked down on him. He also wrote that Vang wanted Rugama to "have something against" Lee and Rugama told him no. On May 14,

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<sup>28</sup> Tr. 492-502, 511-516; GC Exhs. 32, 33, 35, 45.

<sup>29</sup> GC Exh. 13.



the Respondent obtained a statement from Mai Thao, the employee whom Xiong identified as potentially having information about the allegation that Tarkowski was racist. She stated she had no issues with Tarkowski. On May 15, Thao met with Schwartz and Walter Brzoska, another production supervisor. Thao provided a second statement, in which he wrote: "I was  
 5 break at that Jack Lee on break too I hear he say monkey people. I don't know who hear that too a lot people break in the breakroom. He say that but I don't know who he say to." Brzoska later reported the details of the meeting to Sipiorski. He wrote that Thao told them he was on break and Lee came up to him and a group of employees and expressed frustration that the line was not running well and was constantly up and down. Thao told them that Lee said the  
 10 people in that area were causing issues because they were stupid. He also told them that Lee said "monkey people" while venting about the problem. Thao also told them that the "pack-off" area was creating the frustration that day, but later said he did not know what area or employees to whom Lee was referring.<sup>30</sup>

#### 15 *B. The May 16 Investigatory Meeting with Tou Vang*

On May 16, Preisler and Sipiorski interviewed Vang as part of their investigation. Vang brought in a new statement, in which he denied that Preisler told him not to speak to anyone about the investigation. He also again denied speaking to Rugama in the cartoner room after his meeting with Preisler. He then admitted for the first time that he had spoken to Rugama in  
 20 the cartoner room in the past and had spoken to him after the May 9 meeting in the hallway. Vang stated he told Rugama that he again had brought up the discrimination issue and Preisler would talk to human resources about it.<sup>31</sup>

After Preisler and Sipiorski read Vang's statement, Sipiorski asked Vang to provide  
 25 additional details regarding his conversations with Rugama. Vang first described his April discussion with Rugama. He included that Rugama told Vang he would have signed Vang's petition, if Rugama had known that Lee called him a monkey. Vang also told them that he had talked to Rugama after meeting with Preisler on May 9. He explained that the conversation was not in the cartoner room, so he was not lying in response to Preisler's May 10 question about  
 30 whether he had spoken to Rugama there. Vang reiterated that human resources had not properly investigated the discrimination issue when employees raised it back in February. Sipiorski told Vang she reviewed the original petition and it did not include Lee's alleged racist comment. Vang asked Sipiorski how she could say she did not know about it when he reported the comment back in February to Schwartz and Scullion and provided them with a statement.  
 35 Vang told her he had copies but, when Sipiorski asked him for one, Vang refused to provide it. Vang told her he had heard the allegation from Thao and that he had reported it to Brenneman. Sipiorski then asked Vang who he talked to about Lee's alleged racist comment. Vang responded that he was not going to tell her. Sipiorski asked who knew about the alleged comment. Vang told her he was not going to say, because he did not know. Sipiorski then  
 40 specifically asked Vang if he spoke to Onyango about it and Vang confirmed he did. Sipiorski

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<sup>30</sup> R. Exhs. 29, 31, GC Exh. 38.

<sup>31</sup> GC Exh. 9.



asked Vang what the purpose of the conversation was. Vang responded that he told Onyango about discrimination and how human resources did not investigate Vang's claim. Vang said he had a right to speak with Onyango and Rugama about the issue. Preisler asked Vang how he knew Rugama was one of the employees to whom Lee was referring. Vang responded he did not know for sure if it was Rugama, but it did not matter if it was him or another employee. Sipiorski then asked Vang what he wanted and Vang told her he wanted the two of them to know about Lee's comment.<sup>32</sup>

Following the meeting with Vang and also on May 16, Xiong provided a statement to the Respondent. In it, Xiong said she refused to sign Vang's February petition because she did not know what it was about. She also said that Vang told her he wanted a lot of people to sign the petition, so he could get Lee fired and take Lee's position.<sup>33</sup>

### *C. The Respondent's May 21 Discharge of Tou Vang*

As the investigation was ongoing, Sipiorski prepared and ultimately completed a spreadsheet detailing Vang's claims and the results of the investigation.<sup>34</sup> The spreadsheet included rows entitled "situation," "evidence," "next steps," "findings," "disciplinable," and "level" of discipline. Sipiorski identified four "situations" warranting Vang's termination. The first was Vang's claim that Xiong stated Tarkowski was a racist. In her findings, Sipiorski wrote that Xiong did not recall saying it, but she did say that Tarkowski was tougher on Hmong employees. Despite Xiong not denying Vang's allegation, Sipiorski wrote that Vang's claim was "unfounded" and that Vang's termination was warranted because he provided "false claims."

The second situation Sipiorski identified as warranting termination was Vang's claim that Rugama would have signed the petition if he knew about the monkeys comment. The only evidence she cited was Rugama writing in his statement that "he doesn't care what was said." However, Rugama's full comment was "I don't care what they said that I am monkey, what I know is that I am a human," suggesting that, as would be expected, he was not happy about the monkeys comment. In addition, Sipiorski did not include as a next step that Rugama be asked if he actually had made the comment Vang attributed to him. Despite not having a direct denial

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<sup>32</sup> Tr. 97-101, 143-150, 164, 350-359, 502-507, 518-523; GC Exhs. 9, 54, 55. Preisler, Sipiorski, and Vang all testified concerning their May 16 meeting. Their testimony largely was consistent and contained no material conflicts. Of particular note is that Sipiorski confirmed she asked Vang repeatedly for the names of other employees whom he had spoken with about Lee's monkeys comment. She also admitted she asked Vang why he spoke to Onyango and Rugama. She claimed that she asked the questions to obtain the names of other witnesses who heard Lee make the alleged racist comment. She also justified the questions on the basis of needing to determine if other witnesses were just reporting what Vang had told them about Lee's comment and what Vang's motive was for making the complaints against Lee. (Tr. 350-359.)

<sup>33</sup> R. Exh. 39.

<sup>34</sup> GC Exh. 57. I grant the General Counsel's unopposed motion, filed November 15, 2019, to correct the electronic record in this case to reflect the original highlighted copy of the spreadsheet.



from Rugama to Vang's claim, Sipiorski concluded that Vang had made "unsubstantiated allegations" and was "lying during an investigation."

The third situation was Vang's claim that Lee called a group of three black employees monkeys. For evidence, Sipiorski wrote that Vang stated he overheard Thao make the allegation and that Thao confirmed he heard Lee say "monkey people" in the breakroom. She then noted that Thao could not provide the context, who Lee was referring to, or the identities of other witnesses. She wrote that despite having Brzoska's statement from his interview with Thao, which corroborated Vang's claim regarding the monkeys comment and why it was made. In that statement, Brzoska wrote that Thao stated that Lee said "monkey people" due to frustration with the AL5 line not running well and attributing the problem to people in the pack-off area who were stupid. Nonetheless, Sipiorski's findings were that no discrimination or racism had been found, because the "monkey people" statement could not be confirmed as being directed at anyone. She concluded that Vang's termination was warranted because of "false allegations and lying during an investigation."

The fourth situation was Vang telling Rugama and Onyango that Lee had called them monkeys. For evidence, Sipiorski wrote:

Claim that Lee called Africans monkeys. Vang is deliberately telling African employees that Lee said this. Statement from Rugama that Vang has approached him and told him this on more than three occasions. Vang encouraged Rugama to go to HR. Statement from Onyango that Vang told him Lee called African employees on AL5 monkeys. Vang confirmed he is (sic) talked about it on the floor and telling employees Lee called African employees "monkeys."

In her findings, Sipiorski wrote:

Vang is spreading false statements about a co-worker that can cause others to think poorly of him and could get the co-worker terminated. No confirmation of Lee calling African employees monkeys.

Sipiorski concluded that this situation warranted Vang's termination because Vang made "false statements." At the bottom of the spreadsheet, Sipiorski wrote: "Recommending termination based on unsubstantiated claims and lying during an investigation."

Sipiorski reviewed her spreadsheet with Rajchel. She recommended that Vang be terminated and Rajchel agreed. They spoke with Brenneman, who reviewed the investigation's findings and concurred that Vang should be discharged.<sup>35</sup>

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<sup>35</sup> Tr. 371-374, 467-469.



On May 21, Vang again met with Sipiorski and Preisler. Sipiorski told Vang that his claim regarding Lee's alleged racist comment was false and that Vang refused to cooperate in their investigation, so he was terminated. She did not say he was discharged due to lying during the investigation. The Respondent's corrective action form for Vang's termination states the following as the justifications for his discharge:

Tou Yia Vang was found to be dishonest when he presented false information and refused to cooperate in the investigation to substantiate his claims. Tou's actions result in termination per the Nestle Employee Handbook.

Sipiorski's spreadsheet contained no mention of Vang's refusal to cooperate in the investigation as a basis for discharge. She also did not mention that justification in her subsequent meeting with Rajchel.<sup>36</sup>

Following his discharge, Vang filed a complaint with the Federal Occupational Safety and Health Administration. Rajchel submitted a response to the complaint. Regarding Lee's alleged racist remarks, Rajchel stated that the HR department determined that "the only person who claimed to have heard the remarks was Mr. Vang" and "[n]o other employee witnessed or corroborated these remarks." She concluded by saying that Vang was discharged for dishonesty and insubordination in refusing to cooperate with the investigation he initiated.<sup>37</sup>

The Respondent's disciplinary guidelines in its employee handbook contain a list of serious offenses which may result in an employee's immediate discharge without prior warning. The list includes dishonesty. From January 10, 2017 to August 19, 2018, the Respondent discharged 10 total employees based, in whole or in part, upon dishonesty. The Respondent concluded in 6 of the 10 cases that the employee involved lied during a company investigation.<sup>38</sup>

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<sup>36</sup> Tr. 102-105, 375-380, 423-424; GC Exhs. 10, 19. In her testimony, Sipiorski acknowledged that she never questioned Vang about Xiong's allegation that Vang was trying to get Lee fired or about Rugama's comments in his statement that he did not care what Lee said. (Tr. 384-385, 392.) Sipiorski also admitted that Vang never asserted he heard Lee's comment firsthand. (Tr. 389.)

<sup>37</sup> GC Exh. 48.

<sup>38</sup> R. Exhs. 5, 45, 46; Tr. 246-257, 527-528. At the hearing, Respondent Exhibit 5 containing employees' termination forms was identified, but never specifically entered into the record. I correct that inadvertent error now and admit Respondent Exhibit 5 into evidence. The official record already reflects the exhibit as being in the record.



## ANALYSIS

## I. DID VANG ENGAGE IN PROTECTED CONCERTED ACTIVITY?

5 The General Counsel's complaint alleges that the Respondent's employees, including Tou Vang, engaged in protected concerted activity in February 2018 by submitting a signed petition addressing concerns about their working conditions. The complaint also alleges employees, including Vang, engaged in protected concerted activity in May 2018 by again  
 10 raising working condition concerns, which included the Respondent's inadequate response to the February 2018 petition and to racially discriminatory statements made in the workplace.

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section  
 15 7 protects employee conduct that is both "concerted" and engaged in for "mutual aid and protection," guaranteeing employees "the right to act together to better their working conditions." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962). To find an employee's activity to be "concerted," the conduct must be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. *Meyers Industries*, 268  
 20 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Concerted activity includes an individual employee bringing a truly group complaint regarding a workplace issue to management's attention or when the totality of the  
 25 circumstances supports a reasonable inference that the employee was seeking to initiate, induce or prepare for group action. *Alstate Maintenance*, 367 NLRB No. 68, slip op. at 3, 7 (2019). The "mutual aid or protection" clause focuses on the goal of concerted activity, specifically whether the employee or employees involved are seeking to improve their terms and conditions of employment or otherwise improve their lot as employees. *Eastex, Inc. v. NLRB*, 437 U.S. 556,  
 30 565 (1978).

No question exists that Vang engaged in protected concerted activity in February 2018. Vang solicited and obtained seven employee signatures on a petition complaining about how Lee mistreated his coworkers. Most of the examples Vang detailed consisted of Lee verbally  
 35 abusing employees, including yelling at and insulting them. The petition sought an investigation into Lee's conduct. Vang submitted the petition and Schmitt's statement describing Lee's misconduct towards her on February 8. Vang's preparation and submission of a petition containing employees' concerns about their working conditions and the impact Lee was having on those conditions was protected concerted activity.<sup>39</sup> See, e.g., *Chipotle Mexican*

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<sup>39</sup> It is irrelevant that Lee was not a statutory supervisor, but rather an employee under the Act. Group complaints about a coworker likewise are protected. *Jhirmack Enterprises*, 283 NLRB 609, 609 fn. 2 (1987).



*Grill*, 364 NLRB No. 72, slip op. at 1 fn. 3 (2016); *Avalon-Carver Community Center*, 255 NLRB 1064, 1064 fn. 2, 1070-1071 (1981).

Vang also engaged in protected concerted activity during his February 12 meeting with Schwartz and Scullion. Vang submitted a statement alleging that Lee made the monkeys comment and told the two supervisors about it. Protesting an employer's alleged discriminatory treatment of other employees based on their race or ethnicity is conduct engaged in for mutual aid or protection. *PruittHealth Veteran Services-North Carolina, Inc.*, 369 NLRB No. 22, slip op. at 1 fn. 1, 8-10 (2020); *Churchill's Restaurant*, 276 NLRB 775, 777 (1985). Having previously discussed Lee's comment with Thao and having already submitted a petition with group complaints about Lee's verbal abuse of employees, Vang's individual report of the alleged racist comment likewise was concerted as a logical outgrowth and/or continuation of the earlier protected concerted activity. *Mitsubishi Hitachi Power Systems Americas, Inc.*, 366 NLRB No. 108, slip op. at 17-18 (2018) (individual employee's submission of letter complaining about supervisor's bullying and abusive behavior towards himself and other employees was protected); *Meyer Tool, Inc.*, 366 NLRB No. 32, slip op. at 10 (2018) (individual employee's complaint that supervisor had verbally assaulted him was concerted, in part because it was a logical outgrowth of similar concerns expressed by multiple employees the prior day).

Vang's protected concerted activity continued in his March 1 meeting with Plant Manager Brenneman. Vang and Schmitt both were upset about Sipiorski's conduct in her February 21 meeting with the petition signers. Their reaction was more than understandable. Rather than taking the employees' concerns seriously, Rajchel and Sipiorski thoughtlessly played a joke on them to teach them a lesson about signing something they had not read. Sipiorski also accused certain group members of not thinking about how they had put Lee's employment in jeopardy. She did not even inform the employees that the investigation determined some of their complaints about Lee were valid and Lee was suspended without pay as a result. Dissatisfied with HR's handling of the petition, Vang went to Brenneman and detailed the employees' complaints about Lee, including the alleged monkeys comment. Although Vang met individually with Brenneman, he was bringing group complaints about Lee to the attention of the plant manager and thus engaged in protected concerted activity. His conduct also was a logical outgrowth and/or continuation of the protected concerted activity engaged in by the group when they previously expressed their concerns about Lee in the petition. Finally, Vang told Brenneman about his and Schmitt's view that human resources had mishandled its response to the employees' complaints. This likewise constitutes protected concerted activity. *Phoenix Transit System*, 337 NLRB 510, 510, 513-514 (2002) (individual employee's written articles in union newsletter complaining about employer's lack of response to employees' sexual harassment complaints was protected concerted activity).

Vang also engaged in protected concerted activity in April by discussing Lee's alleged racist comment with Onyango and Rugama. When those conversations took place, Vang already had reported the monkeys comment to the Respondent on two occasions. At no point thereafter did the Company give Vang any indication it investigated the allegation or, if it had, what conclusion had been reached concerning it. What Sipiorski did tell Vang is that



“everything stands” after Brenneman’s commitment to take a fresh look at the investigation. Because of his continuing dissatisfaction with the Respondent’s inadequate investigation, Vang approached Onyango and Rugama to inform them of the alleged racist comment. In response, Onyango told Vang he could not believe the Company would not investigate the allegation and  
 5 Rugama told him he would have signed Vang’s petition if he had known about the comment. Again, the discussion amongst employees about a coworker’s discriminatory statement is conduct for mutual aid and protection. Moreover, given this totality of the circumstances, it is proper to infer that Vang was seeking to initiate group action. By disclosing the comment to the two employees, Vang implicitly was attempting to get Onyango and Rugama to join him in  
 10 calling on the Respondent to adequately investigate whether Lee made the monkeys comment.<sup>40</sup> Thus, Vang’s conversations with Onyango and Rugama were protected concerted activity. *PruittHealth Veteran Services-North Carolina*, supra (employees’ discussions of supervisor’s actions creating a workplace atmosphere of racial discrimination were protected concerted activity); *Phoenix Transit System*, supra (employees’ right to discuss their sexual harassment complaints among themselves held protected); *Dearborn Big Boy No. 3*, 328 NLRB 705, 710 (1999) (employees who raised with their coworker the possibility that their coworker’s daughter was not hired due to racial discrimination were engaged in protected concerted activity).

Vang’s protected concerted activity culminated in his conduct on May 9. First, in the  
 20 Vang brothers’ meeting with Balakrishnan and Preisler, Tou Vang reported Lee’s alleged racist comment to Preisler for the first time, as well as his view that HR had not properly investigated the claim. He told the two supervisors that he had spoken to Rugama about the comment and Rugama responded that he believed Lee was referring to him. Vang also described his February discussion with Xiong and her claim that Tarkowski was racist. As a result of this  
 25 meeting, the Respondent finally investigated Lee’s alleged monkeys comment, 3 months after Vang first reported it. Vang’s discussion with his supervisors constituted actual protected concerted activity, as well as a continuation of the earlier protected conduct in February, March, and April. Second, following this meeting, Vang informed Rugama that he had spoken with Preisler and told Preisler about the monkeys comment. He also advised Rugama that HR might  
 30 come to speak to him about it. Vang’s discussion was a continuation of his earlier effort to get Rugama to join him in calling for an adequate investigation into the allegation against Lee. Moreover, Vang was discussing a disciplinary investigation involving a fellow employee, conduct that is protected by Section 7.<sup>41</sup> *INOVA Health System*, 360 NLRB 1223, 1228 (2014); *Caesar’s Palace*, 336 NLRB 271, 272 (2001).

The Respondent argues that Vang’s discussion of Lee’s alleged racist comment was not protected concerted activity for multiple reasons. First, the Respondent claims that neither

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<sup>40</sup> Sipiorski herself later wrote in her May investigation spreadsheet that “Vang encouraged Rugama to go to HR” when telling Rugama about Lee’s alleged racist comment. (GC Exh. 57.)

<sup>41</sup> Prior to Vang and Rugama conversing on May 9, the Respondent had not instructed Vang to refrain from discussing the investigation with other employees while the investigation was ongoing. See *Unique Thrift Store*, 368 NLRB No. 144, slip op. at 2 (2019). It also did not maintain a rule mandating the confidentiality of investigations while they are ongoing. The Respondent’s handbook only states that confidentiality of an investigation will be maintained by the Company to the extent practicable.



Onyango nor Rugama supported Vang's decision to raise the concern about Lee's comment with Preisler and to continue pursuing an adequate investigation into it. However, an employee need not secure other employees' agreement on a course of action for activity to be concerted. *Circle K Corp.*, 305 NLRB 932, 933 (1991), *enfd. mem.* 989 F.2d 498 (6th Cir. 1993).

Second, the Respondent contends that Vang raised Lee's comment with Preisler solely for the purpose of getting Lee's line coordinator position, if and when the Respondent discharged Lee. An employee's subjective reason for engaging in conduct is irrelevant to the question of whether the conduct is concerted. Rather, "[e]mployees may act in a concerted fashion for a variety of reasons—some altruistic, some selfish—but the standard under the Act is an objective one." *Ibid.* The record evidence objectively establishes that, from February 6 to May 9, Vang served as a spokesperson for a group of employees who felt Lee mistreated them and continually raised concerns about Lee's verbal abuse of employees. It also objectively establishes that Vang sought to improve his coworkers' working conditions, because the specific examples of Lee's misconduct which Vang reported all involved other employees, not Vang himself. Furthermore, Vang took on the spokesperson role, in part, because some in the group could not speak English or did not feel comfortable making a direct complaint about Lee to human resources. Thus, even if Vang sought Lee's discharge to take his position, he also sought to improve how Lee treated his coworkers if Lee remained employed.<sup>42</sup>

Finally, the Respondent contends that, even if Vang's conversations with Rugama were protected, Vang lost the protection of the Act by engaging in egregious misconduct therein. Specifically, the Respondent claims Vang fabricated that the monkeys comment referred to black employees, then planted the false information with Rugama so he would become a witness who would support Vang's claim against Lee. Looking at the totality of the circumstances<sup>43</sup>, I find no merit to this contention. First, when Vang spoke to Rugama in mid-April, he informed Rugama that he overheard Thao tell other employees that Lee said he put three monkeys on bins and they could not do it. Rugama, not Vang, then said he thought Lee was referring to Rugama and two other black employees who worked on bins on a night in the recent past. Based upon what Rugama told him, Vang had a good-faith basis for asserting the monkeys comment referred to black employees. Second, Vang's motivation for disclosing the comment to Rugama was his belief that the Respondent had not properly investigated the allegation, not trying to create a witness. When Vang reported Lee's alleged racist comment to Preisler, he was upfront about hearing the comment from Thao secondhand. He also disclosed having spoken to Rugama about it and Rugama telling Vang he thought the comment referred

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<sup>42</sup> Furthermore, the attempt by employees to cause the removal of a supervisor, even when it is the sole or primary purpose of their conduct, is protected when, as here, it is evident the supervisor's conduct has an impact on employees' working conditions. *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676, 681 (2000).

<sup>43</sup> The appropriate standard, under the weight of Board decisions, to determine whether there is a loss of protection in a conversation between employees is the totality of the circumstances surrounding the conduct at issue. *Entergy Nuclear Operations, Inc.* 367 NLRB No. 135, slip op. at 1 fn. 1 (2019), citing *NC-DSH, LLP*, 363 NLRB No. 185, slip op. at 1 fn. 3 (2016).



to him. When Rugama met with Preisler the next day, he confirmed that Vang had spoken to him twice about the issue, once in the past where Vang disclosed Lee's comment and again on May 9 when Vang told him nothing more than that Preisler might come to ask him about the issue the next day. The sequence of events establishes that Vang was eliciting Rugama's assistance to secure a proper investigation into Lee's alleged racist comment. I find that Vang did not engage in misconduct that removed him from the protection of the Act.<sup>44</sup>

For all these reasons, I conclude that, on multiple occasions from February 6 to May 9, Vang engaged in protected concerted activity.<sup>45</sup>

## II. DID THE RESPONDENT VIOLATE SECTION 8(a)(1) BY INSTRUCTING VANG NOT TO SPEAK WITH EMPLOYEES FOLLOWING HIS SUSPENSION?

The General Counsel's complaint alleges that the Respondent violated Section 8(a)(1) by coercively instructing employees on May 10 to refrain from protected concerted activity, specifically from discussing workplace investigations. This allegation is premised upon HR Representative Scullion telling Vang on the phone immediately after Vang was suspended that "we don't want you to talk to anybody." The Respondent argues the instruction was lawful, because confidentiality was necessary to protect the integrity of its investigation.

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<sup>44</sup> Whether or not Lee actually made the monkeys comment and, if so, made it in reference to black employees is irrelevant to the determination as to whether Vang engaged in protected concerted activity. I make no finding in those regards. Nonetheless, the Respondent had sufficient information to suggest the comment had been made and it was in reference to black employees. In particular, Thao confirmed to Brzoska during their May 15 meeting that Lee had said "monkey people" to a group of employees due to frustration from the production line not running well; Lee attributed the performance issues to the employees being stupid; and that "pack-off," or the job function involving the bins, was creating Lee's frustration. Thus, the Respondent had confirmation from Thao that Vang's account of his conversation with Thao was accurate. It also had a direct contradiction of Lee's claim that he never used the term "monkey people" at work. Brzoska reported this information to Sipiorski, but the Respondent never followed up with Lee.

<sup>45</sup> The General Counsel's complaint alleges that Vang engaged in protected concerted activity on February 8 and 12, and on May 9. It does not allege that Vang engaged in protected conduct on March 1 when he met with Brenneman or on the April dates he met with Onyango and Rugama. Nonetheless, I find that the issue of whether Vang engaged in protected conduct in March and April is closely connected to the subject matter of the February and May allegations in the complaint and the parties fully litigated the issue at the hearing. Vang's conduct in March and April was a part of the sequence of events linking his protected conduct in February and May. His conduct in March, April, and May all involved pushing the Respondent to properly investigate the claim that Lee made a racist comment. The Respondent called Brenneman to testify about his meeting with Vang and had the opportunity to cross-examine Rugama about his conversations with Vang. Accordingly, the finding that Vang engaged in protected concerted activity in March and April is proper, despite the absence of specific complaint allegations. *Pergament United Sales, Inc.*, 296 NLRB 333 (1989), *enfd.* 920 F.2d 130 (2d Cir. 1990).



In *Unique Thrift Store*, 368 NLRB No. 144 (2019), the Board held that facially-neutral employer workplace rules which by their terms require investigative confidentiality for the duration of any open investigation are lawful under *Boeing Co.*, 365 NLRB No. 154 (2017). Such rules fall into *Boeing* Category 1, as lawful to maintain without any need to balance an employer's legitimate business justifications for requiring confidentiality of the investigation versus the effect a temporary prohibition has on employee's exercise of Section 7 rights. The Board also held that investigative confidentiality rules which are not limited in duration fall in *Boeing* Category 2 and require application of the balancing test. Although *Unique Thrift Store* involved handbook rules, the Board also noted in that decision that the same balancing test applies to oral confidentiality instructions delivered to employees.<sup>46</sup> *Id.*, slip op. at 3 fn. 4, citing *INOVA Health System*, supra at 1229 fn. 16.

Scullion's instruction to Vang to not talk to anybody did not contain any temporal limitation. Thus, it falls into *Boeing* Category 2 and its balancing test. The Respondent had one of the most compelling business interests to justify Scullion's instruction: preserving the integrity of its investigation into the workplace complaints made by the Vang brothers, including Lee's alleged racist comment. *Id.*, slip op. at 4, 8. Employers must be able to require that matters discussed in an investigative interview are not disclosed outside that room to prevent potential witnesses from coordinating their accounts of relevant events. On the flip side, employees have a Section 7 right to discuss their own or their fellow employees' discipline or incidents that may lead to discipline, where the discussions look towards group action. *Caesar's Palace*, supra. Here, Scullion's instruction went beyond narrowly requiring Vang not to discuss the investigation of the complaints or the interviews conducted during the course of the investigation. *Unique Thrift Store*, supra, slip op. at 8. In addition to not containing any time limitations, the instruction also was worded so broadly that it prohibited Vang from talking to any employee about any disciplinary issue. The instruction's breadth reaches even Vang's discussion with other employees of workplace issues generally and of disciplinary policies or procedures. In these circumstances, the impact on employees' exercise of their Section 7 rights outweighs the Respondent's legitimate business interest in preserving the integrity of its investigation. Thus, Scullion's instruction violated Section 8(a)(1).

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<sup>46</sup> The General Counsel contended that Scullion's statement to Vang was the promulgation of an unlawful rule in response to Vang's protected concerted activity on May 9. See *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). However, the complaint does not allege the unlawful promulgation of a work rule, but rather a coercive instruction to refrain from engaging in protected concerted activity. Moreover, an instruction by a supervisor to a single employee which was not repeated to any other employee as a general requirement does not constitute the promulgation of a work rule. *Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 2 fn. 10 (2018). Thus, Scullion's conduct cannot be found to violate Sec. 8(a)(1) under that legal theory.



### III. DID THE RESPONDENT VIOLATE SECTION 8(a)(1) BY INTERROGATING EMPLOYEES CONCERNING THEIR PROTECTED CONCERTED ACTIVITY?

The General Counsel's complaint alleges that the Respondent violated Section 8(a)(1) when, on May 16, Sipiorski interrogated Vang about his protected concerted activity during his investigatory interview.

An unlawful interrogation is one which reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act, under the totality of the circumstances. *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), *affd. sub nom Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The test is an objective one that does not rely on the subjective aspect of whether the employee was, in fact, intimidated. *Multi-Ad Services*, 331 NLRB 1226, 1227-1228 (2000), *enfd.* 255 F.3d 363 (7th Cir. 2001). A nonexhaustive list of factors to consider in this case includes the nature of the information sought; the identity of the questioner; the place and method of interrogation; and the truthfulness of the employee's reply. *Westwood Health Care Ctr.*, 330 NLRB 935, 939-940 (2000); *Bourne v. NLRB*, 332 F.2d 47 (2d. Cir. 1964). None of these factors are to be mechanically applied. *Rossmore House*, *supra* at 1178 fn. 20. In addition, employers may question employees as part of a lawful investigation into facially valid claims of misconduct, even if the alleged misconduct took place during the exercise of Section 7 rights, provided they do not impermissibly pry into the employees' potentially protected conduct. *Hyundai Motor Manufacturing Alabama, LLC*, 366 NLRB No. 166, slip op. at 1-2 (2018); *St. Francis Regional Medical Center*, 363 NLRB No. 69, slip op. at 1 fn. 2 (2015). However, the employer must avoid impinging on Section 7 rights by, among other things, tailoring the questions to address only the narrow facts surrounding the alleged misconduct, offering assurances against reprisals for protected activity, and avoiding probes into the motives for the protected activity. *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 158-159 (2014); *Bridgestone Firestone South Carolina*, 350 NLRB 526, 528-529 (2007).

During the May 16 investigatory interview, Sipiorski repeatedly asked Vang if he had spoken with any employees about Lee's alleged racist comment. She also specifically asked if he had spoken with Onyango and Rugama about it and why he did so. The questioning plainly sought information about the employees' potentially protected conduct. Sipiorski claimed she questioned Vang to obtain the names of other witnesses who heard the comment, as part of the investigation into whether Lee made it. But Vang was clear from the start that he heard the comment from Thao, not directly himself. Moreover, asking Vang with whom he spoke about the comment, as opposed to who heard the comment, could not have been for the purpose of finding a witness with direct knowledge of the comment being made. Sipiorski also claimed that she was investigating if Vang had made his allegations about Lee in good faith or was trying to get Lee fired. She based that justification upon the statements from Burke and Vue alleging that Vang still was mad over the Lee situation, thought Lee should have been fired, and was keeping tabs on Lee to see if he did anything wrong. Rather than suggesting Vang was falsely accusing Lee of making a racist comment, Burke and Vue were describing Vang's continuing protected concerted activity, not misconduct about which Sipiorski could question him. As to the remaining evaluation factors, Sipiorski's questions were not narrowly tailored to



the facts around her suspected misconduct by Vang. Sipiorski never directly questioned Vang about whether he fabricated the claim that the monkey comments referred to black employees. She never asked him about the assertions in the statements of Burke and Vue. Sipiorski also asked Vang why he spoke to Onyango and Rugama about the comment, thereby inquiring as to Vang's motive for his protected concerted activity. At no point did Sipiorski offer assurances to Vang against reprisals for any protected conduct he engaged in. In light of all these circumstances, Sipiorski's questioning of Vang was unlawfully coercive.<sup>47</sup> *Hyundai Motor Manufacturing Alabama, LLC*, supra (supervisor unlawfully interrogated employees during investigation where questions unnecessarily delved into whether employees had acted concertedly, questioning was conducted by HR representative in presence of supervisor, interview laid groundwork for disciplinary action, and two of three employees provided untruthful or evasive answers).

#### IV. DID THE RESPONDENT'S SUSPENSION OF TOU VANG VIOLATE SECTION 8(a)(1)?

The General Counsel's complaint alleges that the Respondent suspended Vang on May 10 due to his protected concerted activity.

"[A] respondent violates Section 8(a)(1) of the Act if, having knowledge of an employee's concerted activity, it takes adverse employment action that is 'motivated by the employee's protected concerted activity.'" *CGLM, Inc.*, 350 NLRB 974, 979 (2007), quoting *Meyer Industries (Meyers I)*, 268 NLRB 493, 497 (1984). The discipline or discharge of an employee in direct response to protected activity is unlawful. See, e.g., *M & M Affordable Plumbing, Inc.*, 362 NLRB 1303, 1307 (2015); *Santa Fe Tortilla Co.*, 360 NLRB 1139, 1141 (2014). In *Santa Fe Tortilla*, a group of seven employees submitted multiple letters to their employer stating their complaints about working conditions. Almost immediately thereafter, the employer discharged two of the group members. The employer later claimed that both employees engaged in misconduct while discussing the letters with and soliciting signatures from other employees. The alleged misconduct included forging an employee's signature on a letter; intimidating, harassing, and lying to employees; asking employees to sign blank documents; and misrepresenting what the contents of the document would be when it was completed. The Board found that the asserted justifications either referred to protected activity but mischaracterized it as misconduct or were factually disproved by the credited record. Thus, the discharges violated Section 8(a)(1).<sup>48</sup>

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<sup>47</sup> The *Rossmore House* factors support this conclusion. The questioning occurred in a closed-door meeting with Preisler, a high-ranking supervisor, and Sipiorski, a human resources representative with whom Vang had clashed in the prior 3 months. Sipiorski's questions sought information on Vang's protected activities. Vang initially answered her questions by restating information he already provided the Respondent, but eventually refused to answer. Such a refusal objectively conveys the coercive impact of the questioning.

<sup>48</sup> Although the Board found a *Wright Line* analysis to be unnecessary in those circumstances, it nonetheless went on to analyze and find that the discharges also would have been unlawful under that framework. In so finding, the Board noted that the employer's asserted reasons for the discharges had been factually discredited and thus found to be false and pretextual.



In this case, I likewise conclude that the Respondent suspended Vang on May 10 in direct response to his protected concerted activity. As previously discussed, Vang advised Rugama on May 9 that he had reported Lee's monkeys comment to Preisler and human resources might come talk to Rugama about it. That brief conversation was protected. No question exists that the Respondent suspended Vang as a direct result of that conversation. Sipiorski and Preisler made the decision immediately after learning of the employees' conversation. Preisler also told Vang he was suspended for talking to Rugama.

Accordingly, the Respondent's May 10 suspension of Vang violated Section 8(a)(1).<sup>49</sup>

#### V. DID THE RESPONDENT'S DISCHARGE OF TOU VANG VIOLATE SECTION 8(a)(1)?

The General Counsel's complaint alleges that the Respondent discharged Vang on May 21 due to his protected concerted activity in violation of Section 8(a)(1).

As a preliminary matter, the parties disagree as to the appropriate legal framework to evaluate this allegation. The Respondent argues Vang's discharge must be analyzed under the Board's mixed-motive test in *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). In contrast, the General Counsel argues that this is a single-motive case, the Respondent discharged Vang for his protected concerted activity, and thus the only question is whether Vang ever lost the protection of the Act. The General Counsel and the Respondent also take divergent views as to whether the Board's framework found in *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964), plays any role in the analysis here.

The Respondent asserted multiple justifications for discharging Vang. In light of this, I conclude choosing a standard to utilize is not an all or nothing proposition. The appropriate framework depends on the rationale asserted. See *MCPC, Inc. v. NLRB*, 813 F.3d 475, 487-490 (3d Cir. 2016); *Shamrock Foods Co. v. NLRB*, 346 F.3d 1130, 1135-1136 (D.C. Cir. 2003), enf. 337 NLRB 915 (2002).

#### A. Vang's Alleged Dishonesty in the May 9 Meeting with Preisler

Two of the Respondent's rationales for discharging Vang arise out of his conversation with Preisler on May 9. As discussed more thoroughly above, Vang was engaged in protected concerted activity during this conversation, because he was questioned about and raised the

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<sup>49</sup> The Respondent suggests that its suspension of Vang was lawful, because it had a past practice of suspending employees pending investigation to preserve the integrity of investigations. Preisler's testimony cited for that proposition falls well short of establishing such a past practice. (Tr. 487.) Sipiorski did not testify about the subject and the record contains no policy to that effect. I found the Respondent's remaining arguments that Vang's conversations with Rugama were not protected meritless, as discussed above.



concerns of fellow employees about working conditions. The Respondent claims that Vang was dishonest in that discussion when he claimed that Lee called three black employees monkeys and when he said that Xiong told him that Tarkowski was racist. Based upon the credited evidence, I have concluded that Vang was not dishonest when making either claim. As a result, to the extent the Respondent relies on those rationales to justify Vang's discharge, the conduct involved is protected concerted activity. Discharging Vang for that protected conduct violates Section 8(a)(1), without the need for any further analysis. See *Santa Fe Tortilla*, supra (where asserted reason for discharge was factually disproved by credited record, *Wright Line* analysis was unnecessary and discharge for protected conduct was unlawful); *Shamrock Foods*, supra (where the record had an absence of credible evidence that an employee engaged in misconduct, his discharge was unlawful without the need for a *Wright Line* analysis).

If *Burnup & Sims* applied to these two rationales, the result remains the same. Under the *Burnup & Sims* framework, an employer may lawfully discipline an employee for engaging in misconduct in the course of otherwise protected activity, but only if it had a good-faith and correct belief that such misconduct occurred. *Aston Waikiki Beach Hotel*, 365 NLRB No. 53, slip op. at 5 (2017), citing *Burnup & Sims*, supra at 23-24 and *La-Z-Boy Midwest*, 340 NLRB 80, 80 (2003). The initial burden is on the General Counsel to establish that the employee was disciplined or discharged for conduct occurring during the course of protected activity. The burden then shifts to the employer to show that it held an honest belief that the employee engaged in serious misconduct. Once the employer establishes that it held an honest belief in the employee's serious misconduct, the burden shifts to the General Counsel to affirmatively show that the misconduct did not in fact occur.

Here, the General Counsel met the initial burden and established that Vang was discharged for allegedly being dishonest during his protected concerted activity on May 9. Consequently, the Respondent had to demonstrate that it had a good-faith belief that Vang was dishonest regarding Lee and Xiong's statements. I conclude the Respondent has not met that burden. I have already detailed why the Respondent's assessment that Vang was lying about the monkeys comment referring to black employees was not substantiated by the evidence. Thus, the Respondent could not believe, in good faith, that Vang was dishonest in that regard. Nonetheless, it is worth noting here that Sipiorski's own investigation summary contradicts the Respondent's claim of a good-faith belief that Vang was dishonest. Regarding Vang's claim that Lee called three black employees monkeys, Sipiorski's investigation summary had two separate columns, one addressing the comment itself and the second Vang's reporting the comment to Rugama and Onyango. In the first column, Sipiorski wrote that Vang initially told the Respondent that he heard the comment from Thao. It also states that Thao confirmed that he heard Lee say, "monkey people" on break and that Lee "denies." But Lee did not deny using the words. He denied using them at work and Thao directly contradicted Lee's claim. In the second column, Sipiorski repeatedly stated that Vang told Rugama that Lee had called Rugama a monkey. But that was not what Vang said to Rugama. He told Rugama that Lee referred to three monkeys on bins and Rugama said he thought Lee was referring to him. As to Vang reporting that Xiong told him Tarkowski was a racist, Sipiorski wrote: "[Xiong] states she does not recall saying it, that it seems like [Tarkowski] is tougher on Hmong employees but no



examples.” Far from supporting that Vang made a false claim, this description actually corroborates Vang’s account of the conversation. Xiong did not deny making the comment to Vang and acknowledged that Tarkowski treated employees differently based upon their ethnicity. The evidence the Respondent collected during its investigation in May did not establish an honest belief that Vang’s claims were false.

Even if it had done so, the record evidence established that Vang’s statements to the Respondent regarding Lee’s and Xiong’s alleged comments were not false. If the *Burnup & Sims* burden was shifted back, the General Counsel demonstrated that Vang did not engage in misconduct.

Thus, the Respondent’s discharge of Vang for two alleged dishonest statements on May 9 was unlawful under *Burnup & Sims* as well.

#### B. Vang’s Alleged Misconduct in the May 16 Investigatory Meeting

The Respondent’s two remaining rationales for Vang’s discharge arose out of the May 16 investigatory meeting with Vang, Sipiorski, and Preisler. First, the Respondent asserts that Vang was dishonest when he claimed Rugama told him he would have signed Vang’s petition if he had known about Lee’s alleged racist comment. Second, the Respondent relies upon Vang’s refusal to answer Sipiorski’s questions during the meeting. The conduct the Respondent is relying upon for these discharge justifications did not occur during Vang’s protected activity. Because the Respondent is relying upon events other than conduct that was protected, the *Wright Line* framework applies to the question of whether those justifications for Vang’s discharge render it lawful. *Fresenius USA Manufacturing, Inc.*, 362 NLRB 1065, 1066 (2015); *Alton H. Piester, LLC*, 353 NLRB 369, 372 fn. 25 (2008).

The *Wright Line* framework is inherently a causation test. *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 7 (2019), quoting *Wright Line*, 251 NLRB at 1089 (“[The Board’s] task in resolving cases alleging violations which turn on motivation is to determine whether a causal relationship existed between employees engaging in union or other protected activities and actions on the part of their employer which detrimentally affect such employees’ employment.”). To prove a discriminatory discharge for protected concerted activity, the General Counsel must demonstrate by a preponderance of the evidence that the employee’s protected conduct was a motivating factor in the employer’s discharge decision. *SBM Site Services, LLC*, 367 NLRB No. 147, slip op. at 2 (2019). In cases involving 8(a)(1) discipline, the General Counsel satisfies the initial burden by showing (1) the employee’s protected concerted activity; (2) the employer’s knowledge of the concerted nature of the activity; and (3) the employer’s animus toward that activity. *Alternative Energy Applications Inc.*, 361 NLRB 1203, 1205 (2014). If the General Counsel makes the initial showing, the burden shifts to the employer to prove that it would have discharged the employee even in the absence of the employee’s protected activity. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004). The employer cannot meet its burden merely by showing that it had a legitimate reason for the discharge; rather, it must demonstrate that it would have taken the same action in the absence of the



protected conduct. *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984). If the evidence establishes that the reasons given for the employer's action are pretextual—that is, either false or not in fact relied upon—the employer fails by definition to show that it would have taken the same action for those reasons and its *Wright Line* defense necessarily fails. *Metropolitan Transportation Services, Inc.*, 351 NLRB 657, 659 (2007).

As previously discussed, Vang engaged in protected concerted activity in February, March, April, and May. The Respondent was aware of the concerted nature of all that activity prior to discharging Vang. The record evidence also establishes the Respondent's, and in particular Sipiorski's, animus towards Vang's protected conduct throughout the same time period. Animus can be demonstrated by direct evidence or inferred from the totality of the circumstances. *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003). Circumstantial factors from which a discriminatory motive may be inferred include the timing of the employer's adverse action in relationship to the employee's protected activity, as well as whether the asserted reasons for the adverse action are a pretext. *Lucky Cab Co.*, 360 NLRB 271, 274 (2014). Pretext may be demonstrated by asserting a reason that is false or providing shifting explanations for an adverse action. *Affinity Medical Center*, 362 NLRB 654, 654 fn. 4 (2015); *Windsor Convalescent Center*, 351 NLRB 975, 983–984 (2007), *enfd.* in relevant part 570 F.3d 354 (D.C. Cir. 2009). In February, Sipiorski responded to the petition Vang spearheaded by holding a meeting at which she chastised and demeaned the employees, rather than addressing their concerns about Lee. In March when Sipiorski met with Vang at Brenneman's direction, she told Vang she was offended in response to Vang saying she did not care about the petitioners. She also told him to bring only "new" concerns to his supervisor's attention, seeking to suppress any further protected conduct regarding the original allegations. In April, Rajchel described Vang as "complex," a self-described "politically correct" term indicating that her actual feelings about Vang and his conduct were less favorable than that word. Prior to his discharge in May, the Respondent suspended Vang for his protected concerted activity and Scullion unlawfully told Vang not to talk to anyone. Sipiorski's handling of the May 16 investigatory meeting indicates that she had enough of Vang and his complaints by that time. Sipiorski interrogated Vang concerning his protected concerted activity. She did not question him concerning claims made against him by other employees. Obviously, the timing of Vang's discharge in relation to his May 9 protected activity, which included seeking a new look from the Respondent into Lee's comment, also supports an animus finding. Finally, the Respondent's reliance on Vang not cooperating in the May investigation as a basis for his discharge is not even contained in Sipiorski's spreadsheet summarizing the results of the investigation. This shifting explanation is indicative of pretext.

Having established Vang's protected concerted activity, the Respondent's knowledge of its concerted nature, and the Respondent's animus towards the activity, the General Counsel has met the initial *Wright Line* burden. Thus, the burden shifts to the Respondent to demonstrate it would have discharged Vang absent his protected conduct. To do so, the Respondent claims that Vang was dishonest when he stated in the investigatory meeting that Rugama told Vang he would have signed Vang's petition if he knew about Lee's racist comment. Based on my earlier credibility determination, I found that Rugama did say this to Vang. Moreover, Sipiorski's investigation spreadsheet stated that Rugama said nothing more



than that he did not care what Lee said, which once again does not constitute a denial of Vang's claim. The Respondent never asked Rugama specifically if he had made the comment to Vang. Thus, this asserted reason is false and indicative of pretext.

5 The Respondent's final justification for Vang's discharge was his refusal to cooperate in the investigation, including identifying other witnesses who could verify his claims. Vang's refusal to answer Sipiorski's questions resulted from her unlawful interrogation into his protected concerted activity. Moreover, employees have a longstanding right to refuse to answer a supervisor's investigatory questions to maintain the secrecy of their protected activity.  
10 *Stoner Lumber, Inc.*, 187 NLRB 923, 930 (1971). Sipiorski asked Vang multiple times in the May 16 meeting to reveal the names of other employees with whom he spoke with about Lee's alleged racist comment. Had Vang spoken to other employees about the comment and given their names to her, he would have revealed their identities and, like Rugama and Onyango, their involvement in protected concerted activity. Vang had a reasonable basis for believing  
15 that Sipiorski was attempting to pry into his protected concerted activity and that he would suffer a reprisal for that activity. Thus, Vang had a right to refuse to answer her questions and the Respondent cannot rely on that refusal to justify Vang's discharge. *Paragon Systems, Inc.*, 362 NLRB 1561, 1565 (2015), citing *Tradewaste Incineration*, 336 NLRB 902, 907 (2001).

20 Even if Sipiorski asked the questions for a valid purpose and Vang had no right to refuse to answer them, the Respondent has not established that it would have discharged Vang for the sole infraction of refusing to cooperate in an investigation. The Respondent did not enter any evidence of discharges for that offense. All of its disciplinary records dealt with discharges involving dishonesty. In addition, both Rugama and Xiong initially refused the Respondent's  
25 requests to provide written statements during the May investigation. The Respondent took no action against them for their refusals.

Accordingly, the Respondent's May 21 discharge of Vang violated Section 8(a)(1).<sup>50</sup>

## 30 VI. THE RESPONDENT'S 10(b) AFFIRMATIVE DEFENSE TO CERTAIN ALLEGATIONS

In its answer to the complaint, the Respondent asserted the following affirmative defense:

35 To the extent that any allegations in the Complaint were not made or raised in an unfair labor practice charge filed within six months of the alleged occurrence, such allegations are barred by the statute

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<sup>50</sup> If Vang was found to have engaged in protected concerted activity during the May 16 investigatory meeting and *Burnup & Sims* applied instead of *Wright Line*, the Respondent's discharge of Vang would remain unlawful. As to the claim that Vang was dishonest about Rugama saying he would have signed the petition if he knew about the monkeys comment, the credited evidence establishes that Rugama did say this. Thus, the General Counsel demonstrated that this misconduct did not occur. As to the claim that Vang refused to cooperate in the investigation, the refusal is protected activity, meaning no misconduct occurred. The Respondent would not have sustained its burden under *Burnup & Sims*.



of limitations set forth in Section 10(b) of the Act. This includes, but is not limited to, the allegation of unlawful interrogation asserted in Paragraphs 7 and 10 of the Complaint, which were not raised in any underlying unfair labor practice charge.

Vang filed the original unfair labor practice charge on November 14, 2018, and the charge was served on the Respondent on November 15, 2018. Thus, the 6-month statute of limitations period runs back to May 15, 2018. The original charge alleged the Respondent discharged Vang on May 21, 2018, for his protected concerted activity. Thus, the charge was timely filed and served. The General Counsel's March 22, 2019 complaint included the additional allegations that the Respondent violated Section 8(a)(1) by coercively instructing employees on May 10, 2018, to refrain from engaging in protected concerted activity, suspending Vang on May 10, 2018 for his protected concerted activity, and unlawfully interrogating employees on May 16, 2018, concerning their protected concerted activity. None of these allegations appeared in the original charge.

Section 10(b) does not bar an otherwise untimely complaint allegation if the allegedly unlawful conduct occurred within 6 months of a timely-filed charge and is closely related to the allegations in that charge. *Charter Communications, LLC*, 366 NLRB No. 46, slip op. at 2 (2018), citing *Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1203 (2014). To determine if an otherwise untimely allegation is closely related to the timely charge, the Board considers: (1) whether the otherwise untimely allegation and the allegations in the timely-filed charge are of the same class, "i.e., whether the allegations involve the same legal theory and usually the same section of the Act"; (2) whether the otherwise untimely allegation and the allegations in the timely-filed charge arise from the same factual situation or sequence of events; and (3) whether the respondent would raise the same or similar defenses to the otherwise untimely allegation and the allegations in the timely-filed charge. *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988).

The unlawful interrogation alleged in the General Counsel's complaint occurred on May 16, 2018, within the prior 6-month period from Vang's filing of the original charge. As to the *Redd-I* factors, the interrogation allegation is legally related to the timely discharge allegation, because both allegations claim that the Respondent's conduct discouraged employees from engaging in protected concerted activities in violation of Section 8(a)(1). The interrogation allegation is factually related to the discharge allegation, because it is part of a progression of events culminating in Vang's discharge. Finally, the Respondent's defense of the interrogation allegation is intertwined with its defense of the unlawful discharge allegation. The May 16 investigatory meeting at which the unlawful interrogation is alleged to have occurred formed part of the basis for the Respondent's discharge of Vang. The Respondent would have presented testimony and documentary evidence regarding the May 16 meeting, even without the interrogation allegation in the complaint. Therefore, I conclude the untimely interrogation allegation is closely related to the timely discharge allegation. The Respondent's 10(b) defense as to that allegation fails. *Charter Communications*, supra, slip op. at 2-4 (2018); *SKC Electric, Inc.*, 350 NLRB 857, 857-859 (2007).



Despite it being the only allegation specifically mentioned in the text of its affirmative defense, the Respondent does not argue that the unlawful interrogation allegation should be dismissed on 10(b) grounds in its brief. Instead, it contends that the May 10 coercive instruction allegation and the May 10 unlawful suspension of Vang allegation are outside the 10(b) period and not closely related to the timely discharge allegation. I reject this argument. To sufficiently plead a 10(b) defense, the Respondent had to specify the allegations it was asserting were untimely in its answer to the complaint or at the hearing. *United Government Security Officers of America International*, 367 NLRB No. 5, slip op. at 1 fn. 1 (2018). The Respondent's catchall text is insufficient to properly plead the affirmative defense as to the coercive instruction and suspension allegations. The Respondent also did not raise the 10(b) defense in regards to these allegations at the hearing. Raising it in the posthearing brief is untimely.

Therefore, I find that the General Counsel's coercive instruction, interrogation, and unlawful suspension allegations are not barred by Section 10(b).

#### CONCLUSIONS OF LAW

1. Respondent Nestlé USA, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Respondent violated Section 8(a)(1) of the Act by:
  - (a) Coercively instructing employees on May 10 not to discuss workplace investigations.
  - (b) Suspending Tou Vang on May 10 due to his protected concerted activity.
  - (c) Interrogating employees on May 16 concerning their protected concerted activity.
  - (d) Discharging Tou Vang on May 21 due to his protected concerted activity.
3. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### REMEDY

Having found that Respondent Nestlé USA, Inc. engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act. Having found that the Respondent violated Section 8(a)(1) by suspending and discharging Tou Vang, I order it to offer Vang full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. I also order the Respondent to make Vang whole for any loss of earnings and other benefits



suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Moreover, in accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Respondent shall compensate Vang for his search-for-work and interim employment expenses, if any, regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. I further order the Respondent to compensate Vang for any adverse tax consequences associated with receiving a lump-sum backpay award and to file with the Regional Director for Region 18 a report allocating the backpay award to the appropriate calendar year. See *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). The Respondent also must remove from its files any references to Vang's unlawful suspension and discharge within 14 days of this Order and, within 3 days thereafter, notify Vang in writing that this has been done and that the unlawful actions will not be used against him in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>51</sup>

#### ORDER

The Respondent, Nestlé USA, Inc., Little Chute, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) Coercively instructing employees not to discuss workplace investigations.
- (b) Interrogating employees about their protected concerted activity.
- (c) Suspending or discharging employees due to their protected concerted activity.
- (d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

- (a) Within 14 days from the date of this Order, offer Tou Vang reinstatement to his former position or, if his job no longer exists, to a substantially equivalent

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<sup>51</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.



position, without prejudice to his seniority or other rights or privileges previously enjoyed.

- (b) Make Tou Vang whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.
- (c) Compensate Tou Vang for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, allocating the backpay award to the appropriate calendar years for each employee.
- (d) Compensate Tou Vang for any search-for-work and interim employment expenses.
- (e) Within 14 days from the date of this Order, remove from its files any references to the unlawful suspension and discharge of Tou Vang and, within 3 days thereafter, notify him in writing that this has been done and that these unlawful acts will not be used against him in any way.
- (f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- (g) Within 14 days after service by the Region, post at its facility in Little Chute, Wisconsin, copies of the attached notice marked "Appendix."<sup>52</sup> Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the

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<sup>52</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."



pendency of these proceedings, Respondent has gone out of business or closed the facilities involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since May 10, 2018.

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- (h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps Respondent has taken to comply.

Dated, Washington, D.C., March 11, 2020



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Charles J. Muhl  
Administrative Law Judge



## APPENDIX

### NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

WE WILL NOT coercively instruct employees to refrain from legally protected workplace discussions, such as instructing you to never discuss workplace investigations.

WE WILL NOT coercively interrogate you concerning your protected concerted activity.

WE WILL NOT suspend you without pay or discharge you due to your protected concerted activity.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Tou Vang immediate and full reinstatement to his former position or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges previously enjoyed.

WE WILL make Tou Vang whole for any loss of earnings and other benefits suffered as a result of our unlawful suspension and discharge of him due to his protected concerted activity, less any net interim earnings, plus interest, and WE WILL also make him whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL remove from our files any references to the unlawful suspension and discharge of Tou Vang and WE WILL notify him in writing that this has been done and that these unlawful acts will not be used against him in any way.



NESTLÉ USA, INC.

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlrb.gov](http://www.nlrb.gov).

Federal Office Building, 212 3<sup>rd</sup> Avenue S, Suite 200 Minneapolis, MN 55401-2221  
(612) 348-1757, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at <https://www.nlrb.gov/case/18-CA-231008> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S

COMPLIANCE OFFICER, (414) 297-3819.